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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 CHRISTY WALKER-SCHAUT,

CASE NO. C23-5944 BHS

9 Plaintiff,

ORDER

v.

10 LIDO LABS HOLDING COMPANY,

11 Defendant.

12
13 This matter is before the Court on Plaintiff Christy Walker-Schaut's motion to
14 dismiss Defendant Lido Labs Holding Company's fraud counterclaim. Dkt. 33. Because
15 Lido fails to state a plausible fraud counterclaim, the motion is granted.

16 Walker-Schaut sued Lido, alleging that it violated both the Washington Consumer
17 Protection Act (CPA) and the federal Telephone Consumer Protection Act (TCPA) by
18 sending her at least 65 unwanted and unsolicited text messages. Dkt. 30, ¶¶ 14, 40–55.

19 Lido answered, asserting a counterclaim for fraud. Dkt. 32, ¶¶ 8–18. It concedes
20 that it sent text messages to Walker-Schaut's telephone number but alleges that Walker-
21 Schaut "submitted opt in information so that she could receive text messages at [her]
22 phone number." *Id.* ¶ 9. Lido claims that Walker-Schaut entered her name, "Christy

1 Walker-Schaut,” and telephone number on a website that “contains a section for website
2 users seeking financial assistance.” *Id.* ¶ 14. It asserts that “[t]he page of this website in to
3 which the information was provided contains clear and unambiguous language explaining
4 that by clicking the button ‘I agree’, the website user is providing express written consent
5 to be contacted regarding Lido’s services.” *Id.* ¶ 15.

6 Lido alleges that Walker-Schaut’s “representation that she was interested in
7 services from Lido was knowingly false” and that she “submitted the opt-in information
8 with the sole intent of manufacturing a TCPA claim against Lido.” Dkt. 32, ¶¶ 10–11.
9 Lido claims that “[t]hese fraudulent misrepresentations, were in fact, relied upon [by]
10 Lido” because it sent text messages to the provided telephone number. *Id.* ¶¶ 16–17. Lido
11 alleges that it “has been damaged by Plaintiff’s fraudulent action in the form of ongoing
12 fees and costs, prior expenditures, reputational damage, business disruption, and the
13 costs of investigation and defense.” *Id.* ¶ 18.

14 Walker-Schaut moves to dismiss Lido’s fraud counterclaim, asserting that Lido
15 “fail[s] to plead that it was explicitly named as a party to the consent agreement,” which
16 “renders [its] claim insufficient and fundamentally flawed.” Dkt. 33 at 1. She also
17 contends that “Lido’s allegation that Walker-Schaut fraudulently induced it to send text
18 messages is based on speculative assertions that lack the requisite elements to support a
19 fraud claim under Washington law.” *Id.* at 1–2. She finally argues that “even taking the
20 allegations at face value, the boilerplate ‘damages’ amount to little more than mere
21 speculation.” *Id.* at 2.
22

1 Lido responds that Walker-Schaut “submitted opt in information on the website
 2 <https://bcd.us-unemployment-resources.com/tc.php> so that she could receive text
 3 massages at [her] phone number” and that “[b]y doing so, Plaintiff represented ‘that she
 4 was interested in services from Lido.’” Dkt. 34 at 5 (citing Dkt. 32, ¶¶ 9, 11, 13). Lido
 5 asserts that “this representation was knowingly false and [Walker-Schaut] ‘submitted the
 6 opt-in information with the sole intent of manufacturing a TCPA claim against Lido.’”
 7 Dkt. 34 at 5 (citing Dkt. 32, ¶¶ 10–11). Lido contends that it relied on Walker-Schaut’s
 8 consent in deciding to send her the disputed text messages. Dkt. 34 at 6–7. Lido finally
 9 asserts that need not “identify its damages with ‘quantifiable loss’” and that its allegation
 10 of damages “is sufficient to put Plaintiff on notice so that she can make ‘an informed
 11 decision of the risks and benefits of continued litigation.’” Dkt. 34 at 8 (quoting *Kathryn*
 12 *Learner Fam. Trust v. Wilson*, 183 Wn. App. 494, 497 (2014)).

13 Dismissal under Fed. R. Civ. P. 12(b)(6) may be based on either the lack of a
 14 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
 15 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A pleading
 16 must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v.*
 17 *Iqbal*, 556 U.S. 662, 678 (2009). A claim has “facial plausibility” when the party seeking
 18 relief “pleads factual content that allows the court to draw the reasonable inference that
 19 the defendant is liable for the misconduct alleged.” *Id.* Although the court must accept as
 20 true the pleading’s well-pleaded facts, conclusory allegations of law and unwarranted
 21 inferences will not defeat an otherwise proper 12(b)(6) motion to dismiss. *Vasquez v. Los*
 22 *Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*,

1 266 F.3d 979, 988 (9th Cir. 2001). “A [party]’s obligation to provide the grounds of his
2 entitlement to relief requires more than labels and conclusions, and a formulaic recitation
3 of the elements of a cause of action will not do. Factual allegations must be enough to
4 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
5 544, 555 (2007) (cleaned up). This requires a party to plead “more than an unadorned,
6 the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing
7 *Twombly*, 550 U.S. at 555).

8 On a 12(b)(6) motion, “a district court should grant leave to amend even if no
9 request to amend the pleading was made, unless it determines that the pleading could not
10 possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe v. N. Cal.*
11 *Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990). However, where the facts are not in
12 dispute, and the sole issue is whether there is liability as a matter of substantive law, the
13 court may deny leave to amend. *Albrecht v. Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

14 Rule 9(b) additionally requires that, “[i]n alleging fraud or mistake, a party must
15 state with particularity the circumstances constituting fraud or mistake,” but that
16 “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged
17 generally.” This rule “demands that the circumstances constituting the alleged fraud be
18 specific enough to give defendants notice of the particular misconduct . . . so that they
19 can defend against the charge and not just deny that they have done anything wrong.”
20 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (internal quotation marks
21 omitted) (quoting *Bly–Magee v. California*, 236 F.3d 1014, 1019 (9th Cir.2001)). To this
22 end, “[a]llegations of fraud must be accompanied by “the who, what, when, where, and

1 how' of the misconduct charged.'"" *Kearns*, 567 F.3d at 1124 (quoting *Vess v. Ciba-*
2 *Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)). In addition to providing a party
3 adequate notice of the charge, Rule 9(b) serves "to protect those whose reputation would
4 be harmed as a result of being subject to fraud charges" and "to prohibit [] [claimants]
5 from unilaterally imposing upon the court, the parties and society enormous social and
6 economic costs absent some factual basis." *Kearns*, 567 F.3d at 1125 (quoting *In re Stac*
7 *Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996)).

8 In Washington, "[t]here are nine essential elements of fraud, all of which must be
9 established by clear, cogent, and convincing evidence." *Elcon Const., Inc. v. E.*
10 *Washington Univ.*, 174 Wn.2d 157, 166 (2012). These elements are:

11 (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the
12 speaker's knowledge of its falsity, (5) the speaker's intent that it be acted
13 upon by the person to whom it is made, (6) ignorance of its falsity on the
14 part of the person to whom the representation is addressed, (7) the latter's
reliance on the truth of the representation, (8) the right to rely upon it, and
(9) consequent damage.

15 *Id.*

16 Lido fails to plausibly allege that Walker-Schaut consented to receiving text
17 messages from Lido. The hyperlink that Lido cites in support of its counterclaim
18 (<https://bcd.us-unemployment-resources.com/tc.php>) is to the terms and conditions of a
19 website entitled, "US UNEMPLOYMENT RESOURCES." This website is comprised of
20 five webpages, and the services provided by this website are not entirely clear from a
21 review of these webpages.
22

1 The terms and conditions of this website state that the website functions to share
2 promotions and offers from its “advertisers,” although it does not describe who those
3 advertisers are or what services they provide:

4 Our Website is a social networking-based website dedicated to sharing the
5 promotions and offers of our advertisers with members of our community.
6 . . . We make regular blog postings advising users of new promotions and
7 offers, and then we provide the tools by which users can accept an offer or
8 promotion from an advertiser, or share information about such promotion
9 or offer with members of their third party social networks.

10 <https://bcd.us-unemployment-resources.com/tc.php>.

11 Although the website states that its operator “make[s] regular blog postings
12 advising users of new promotions and offers,” there is no section of the website devoted
13 to blog posts.

14 The terms and conditions also provide that users may “sign up” on the website and
15 that, by doing so, they will be able to receive undisclosed “samples or freebies” if the
16 user “specifically sign[s] up” to receive those “samples or freebies”:

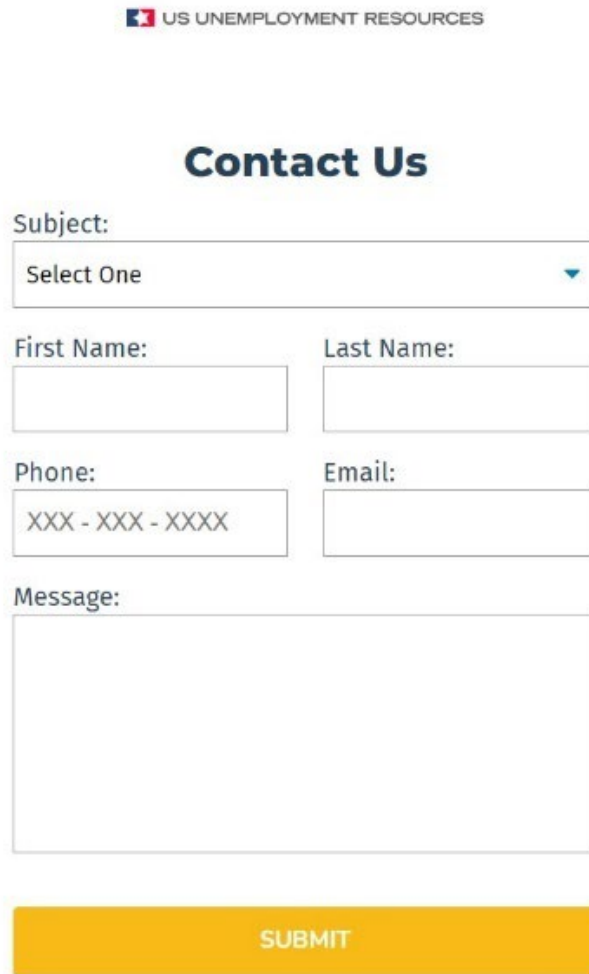
17 • SIGN-UP

18 Registration is not required to use our Website, but you will only be able to
19 receive samples or freebies if you specifically sign up to receive them. If
20 you elect to sign up, you will be asked to provide your name, email address,
21 address, phone number, and date of birth. In an effort to provide you with
22 the most relevant samples or freebies available, you may also be asked to
provide other information including but not limited to your relationship
status, whether or not you ever use coupons, health matters, and your
employment status.

<https://bcd.us-unemployment-resources.com/tc.php>.

Nothing in this paragraph suggests that, by “signing up,” a user agrees to be
contacted by any company, including Lido, about its services.

The website further contains the following webpage through which users may provide their name, phone number, and email address:



US UNEMPLOYMENT RESOURCES

Contact Us

Subject:
Select One ▼

First Name:

Last Name:

Phone:

Email:

Message:

SUBMIT

[Terms & Conditions](#) | [Privacy Policy](#) | [Privacy Notice](#) | [Contact Us](#) | [Unsubscribe](#) | [CA Consumers: Do Not Sell My Info](#)

<https://bcd.us-unemployment-resources.com/contact.php>.

Notably, however, this webpage appears to be only a means through which users may contact the website operator. The top of this webpage states, “Contact Us.” And contrary to Lido’s assertion otherwise, the “button” on this website does not state, “I

1 agree,” Dkt. 32, ¶ 15, it states “SUBMIT.” This webpage accordingly does not appear to
2 be a means through which users may expressly agree to receive messages from Lido. In
3 fact, nowhere on the website, including in its terms and conditions, is Lido mentioned or
4 its “services” described. Lido accordingly fails to plausibly demonstrate that Walker-
5 Schaut consented to receiving text messages from Lido about Lido’s services, or that she
6 was “interested in services from Lido.”¹ Dkt. 32, ¶ 11.

7 In any event, even if Walker-Schaut somehow consented to receiving the disputed
8 text messages from Lido, Lido fails to demonstrate how the mere act of consenting
9 amounts to a false representation. Walker-Schaut either consented to receiving the
10 disputed messages, or she did not so consent. Lido alleges that she consented to receiving
11 the messages by entering on the website her telephone number and name, “Christy
12 Walker-Schaut,” and “by clicking on the button ‘I agree’” to “clear and unambiguous
13 language explaining that . . . the website user is providing express written consent to be
14 contacted regarding Lido’s services.” Dkt. 32, ¶ 15. Even if the Court assumed the truth
15 of this allegation, Lido would plausibly demonstrate only that Walker-Schaut actually
16 wanted to receive Lido’s text messages, regardless of whether she also intended to sue
17 Lido for sending them to her. Her consent to receiving these messages would accordingly
18 be a true—not false—representation.

19
20 ¹ To the extent Lido asserts that Walker-Schaut represented that she was “interested in
21 services from Lido,” Dkt. 32, ¶ 11, Lido not only fails to plausibly allege that Walker-Schaut
22 even made any such representation, but also that Walker-Schaut’s “interest” in its services was
material to its decision to send the disputed text messages or that it relied on Walker-Schaut’s
“interest,” as opposed to her mere consent, in sending the messages.

1 Lido suggests (although does not directly argue) that, if Walker-Schaut consented
2 to receiving the disputed text messages, then she impliedly promised to not sue Lido in
3 the future for sending her text messages in violation of the TCPA. Yet it is well
4 established in Washington that “[a] promise of future performance is not a representation
5 of an *existing* fact and will not support a fraud claim.” *W. Coast, Inc. v. Snohomish Cnty.*,
6 112 Wn. App. 200, 206 (2002) (emphasis added). To the extent that Lido’s fraud
7 counterclaim is based on such a promise, it fails.

8 Lido also fails to plausibly allege damages. Lido claims that it “has been damaged
9 by Plaintiff’s fraudulent action in the form of ongoing fees and costs, prior expenditures,
10 reputational damage, business disruption, and the costs of investigation and defense.”
11 Dkt. 32, ¶ 18. But in Washington, attorney fees and costs are not recoverable unless a
12 contract, statute, or ground in equity expressly authorizes their recovery. *See City of*
13 *Seattle v. Hammon*, 131 Wn. App. 801, 805 (2006) (“Attorney fees are recoverable only
14 when authorized by a private agreement of the parties, by statute or a recognized ground
15 of equity.”) (quoting *State v. Keeney*, 112 Wn.2d 140, 142 (1989)); *Johnson v. Horizon*
16 *Fisheries, LLC*, 148 Wn. App. 628, 633 (2009) (“Under the ‘American rule’ followed in
17 Washington, litigation costs are only recoverable when authorized by statute, rule, or case
18 law.”). Lido Labs fails to cite any authority permitting it to recover attorney fees and
19 costs under these circumstances.

20 To the extent Lido alleges that it has suffered damages “in the form of . . . prior
21 expenditures, reputational damage, business disruption, and the costs of investigation”
22 independent of attorney fees and litigation costs, Dkt. 32, ¶ 18, it does not state a

1 plausible claim for damages. These vague and conclusory assertions are not supported by
2 any specific factual allegations explaining exactly *what* these damages are in the context
3 of this case and *how* Walker-Schaut’s conduct caused them. This is plainly insufficient to
4 survive a Rule 12(b)(6) motion to dismiss. *See, e.g., Iqbal*, 556 U.S. at 678; *Twombly*,
5 550 U.S. at 555; *Vasquez*, 487 F.3d at 1249.

6 Lido cites two unpublished orders from this District in support of its fraud
7 counterclaim. The first is *Barton v. Delfgauw*, No. 3:21-cv-05610-JRC, 2021 WL
8 9869662 (W.D. Wash., Nov. 15, 2021), which denied a pro se plaintiff’s motion to
9 dismiss fraud counterclaims under similar—yet distinct—circumstances. Dkt. 34 at 4–6.
10 In *Delfgauw*, the plaintiff asserted TCPA claims, alleging that the defendants
11 communicated with him by telephone without his consent and while his phone number
12 was registered on the national “Do-Not-Call Registry.” 2021 WL 9869662, at *1. The
13 defendants filed counterclaims for fraud and fraud by non-disclosure, asserting that the
14 “plaintiff opted in to receive communication from defendants or one of their affiliates *by*
15 *using a fake name*” and that, “[b]y doing so, . . . induced them or their affiliates to believe
16 he wanted to be contacted.” *Id.* at 2 (emphasis added). They claimed “that plaintiff
17 ‘intentionally concealed from or failed to disclose’ to defendants that he did not wish to
18 be contacted by them” and “waited to be contacted so that he could file a lawsuit alleging
19 violations of the TCPA.” *Id.*

20 The plaintiff moved to dismiss these counterclaims for failing to satisfy Rule
21 9(b)’s particularity requirement, and the court denied the motion. *Delfgauw*, 2021 WL
22 9869662, at *2. The court reasoned—without mentioning or analyzing the elements of

1 fraud in Washington—that the defendants’ “allegations are sufficient to satisfy Rule 9(b)
2 and put plaintiff on notice of the particular misconduct alleged so that he may defend
3 himself.” *Id.*

4 Lido’s reliance on *Delfgauw* is unpersuasive for several reasons. Most
5 significantly, the defendants in *Delfgauw* alleged that the “plaintiff opted in to receive
6 communication from *defendants or one of their affiliates*.” 2021 WL 9869662, at *2
7 (emphasis added). As explained, Lido fails to plausibly establish that Walker-Schaut
8 consented to receiving communication from Lido about its services. Furthermore, unlike
9 the defendants in *Delfgauw*, Lido does not allege that Walker-Schaut used a fake name to
10 induce it to believe that she wanted to be contacted while her actual name was on the
11 national “Do-Not-Call Registry.” *Id.* at *1. It is only in this regard that the plaintiff in
12 *Delfgauw* made a false representation. To the extent *Delfgauw* suggests that the plaintiff
13 also made a false representation by “‘intentionally conceal[ing] from or fail[ing] to
14 disclose’ to defendants that he did not wish to be contacted by them,” *id.* at *2, the Court
15 respectfully disagrees with this characterization. By affirmatively consenting to receive
16 the messages—even through a fake name—the plaintiff in *Delfgauw* necessarily
17 “wish[ed] to be contacted by” the defendants. *Id.* His act of consenting itself did not
18 amount to a false representation. Finally, *Delfgauw* does not analyze whether the
19 defendants therein stated a plausible claim for damages. *See id.* at 1–2. As explained,
20 Lido’s fraud counterclaim fails in this respect.

21 Lido also cites *Barton v. Alleviate Tax LLC*, No. 3:23-CV-6071-DGE-RJB, 2024
22 WL 3027434 (W.D. Wash. June 17, 2024), which denied the same pro se plaintiff’s

1 motion to dismiss a defendant’s fraud counterclaim in a different TCPA case. Dkt. 34 at
2 6. This one-page order contains virtually no analysis and does not discuss the facts of that
3 case or any of the specific factual allegations underlying the defendant’s fraud
4 counterclaim. *See id.* However, the docket in that case demonstrates that the defendant,
5 who was represented by the same law firm that represents Lido here, alleged that the
6 plaintiff used “dubious” names when consenting to receive the messages underlying his
7 TCPA claims. Dkt. 24, ¶¶ 18–19 and Dkt. 34 at 2 in *Alleviate Tax*, No. C23-6071-DGE-
8 RJB.² Again, Lido does not claim that Walker-Schaut used a fake or “dubious” name to
9 consent to receiving the disputed messages. To the contrary, it alleges that she used her
10 actual name, “Christy Walker-Schaut.” Dkt. 32, ¶ 14. The defendant in *Alleviate Tax*, like
11 Lido, sought damages for “the cost of defending litigation instigated by Plaintiff under
12 false pretenses.” Dkt. 24, ¶ 20 in No. C23-6071-DGE-RJB. Insofar as the *Alleviate Tax*
13 order concludes that such damages were properly sought through a fraud claim, the Court
14 respectfully disagrees with it. *See* 2024 WL 3027434, at *1. Lido’s reliance on *Alleviate*
15 *Tax* is unpersuasive.

16 For these reasons, Lido fails to state a plausible fraud counterclaim. Walker-
17 Schaut’s motion to dismiss Lido’s fraud counterclaim, Dkt. 33, is accordingly
18 **GRANTED**, and that counterclaim is **DISMISSED with prejudice**.

19 **IT IS SO ORDERED.**

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22 ² The Court takes judicial notice of these documents. *See* Fed. R. Evid. 201.

1 Dated this 26th day of September, 2024.

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4 BENJAMIN H. SETTLE
5 United States District Judge
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